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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 537

FASHION ORIGINATORS GUILD OF AMERICA, INC., et al.,
Petitioners,

against

FEDERAL TRADE COMMISSION,
Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

For the convenience of the Court, petitioners herein set forth the answers to the questions propounded by the Court upon oral argument.

I

Why did the Commission ban the program?

The Commission entered its cease and desist order upon the erroneous proposition that the collective refusal of the members of the Guild to do business with retailers is illegal per se (as distinguished from prima facie illegal) and that no evidence in justification, of whatever character, was relevant or material.

The case was tried, the findings of the Commission made and the order entered upon the simple issue that an alleged

boycott existed and that the reason permitting such action by members of the Guild was wholly irrelevant and immaterial (fols. 5909, 5912, 6617, 6620, 6677, 7406-7416, 7706, 7775, 8642, 10962-10975, 11037, 12051, 12922, 13111, 13118).

As was said by the attorneys for the Commission:

(Fol. 10962)

> "Mr. Haycraft: I want to make this plain—that I shall object to any question that will refer to whether or not style piracy is good or is not good as a thing that should be done. That is not an issue in this case. It has not been made an issue in this case."

(Fol. 10974)

> "Mr. Haycraft: The contention of the Commission is that regardless of whether this is an evil or a benefit, that you cannot use a boycott to stop it and that is the issue in this case."

(Fol. 12923)

> "Examiner Diggs: The simple question in this case is whether, conceding that the respondents have done the things charged in the complaint, those things constitute a violation of law. And that is the only issue in this case and therefore I am going to refuse to permit the respondents to introduce any testimony along the lines indicated; that is to say, testimony showing the necessity for this action or the chaotic condition of the industry prior to its adoption."

This was summed up in the brief of the attorneys for the Federal Trade Commission in asking for the issuance of a cease and desist order by the Federal Trade Commission in the following statement:

> "The question to be determined is not what was the reason which led to the boycott, but is whether or not in fact there was a boycott as a result of a combination or a conspiracy."

II

Whether proceedings are brought under the Federalo Trade Commission Act or the Sherman Act, the standard for the interpretation of what is an unfair method of competition is the same and under each it is at all times necessary to determine the reasonability of the restraint complained of with relation to the particular industry involved. *Silver* v. *Federal Trade Commission,* 289 Fed. 985, 990; *Federal Trade Commission* v. *Beech Nut Co.,* 257 U. S. 441; *Federal Trade Commission* v. *Gratz,* 253 U. S. 421; *Standard Oil Co. of N. J.* v. *Federal Trade Commission,* 282 Fed. 81; *Toledo Pipe Threading Machine Co.* v. *Federal Trade Commission,* 6 Fed. (2d) 876; *Federal Trade Commission* v. *Paramount-Famous-Lasky Corp.,* 57 Fed. (2d) 152; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 Fed. (2d) 554, 559; *Atchison, Topeka & Santa Fe R. R.* v. *United States,* 295 U. S. 193, 201, 202; *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U. S. 568, 579.

Notwithstanding the foregoing, the Commission refused to permit petitioners to introduce evidence and in addition failed to make findings with respect to the facts peculiar to the business in which the restraint was imposed, the nature of the restraint, the effect actual or probable, the history of the restraint, the evil complained of necessitating the reason for adopting the particular remedy, the reasonableness of the application of the restraint in the light of the evil sought to be ameliorated or the economic necessity for the things sought to be obtained (see offer of proof, fols. 12927-12980). Proof with relation to all of the foregoing has been held a sine qua non for the determination of whether or not the restraint is illegal. *Sugar Institute* v. *United States,* 237 U. S. 553; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344.

III

Since the respondent failed to make appropriate findings with respect to the history and economic background as enumerated above, which failure was deliberate and premeditated in an attempt to establish an untenable theory, it is urged that the order appealed from should be reversed and the Commission's complaint dismissed. *Bene & Sons* v. *Federal Trade Commission,* 299 Fed. 468, 471; *United States* v. *Whiting,* 212 Fed. 466, 476, 479; *Heuser* v. *Federal Trade Commission,* 4 Fed. (2d) 632, 634; *Philip Carey Manufacturing Co.* v. *Federal Trade Commission,* 29 Fed. (2d) 49.

IV

The Court below sustained the Commission's order, not upon the ground that a boycott was illegal per se, but upon the ground that because petitioners' actions resulted in the creation of a minute and limited monopoly (the meaning of which is undefined) there could be no justification for the program. The Court's decision therefore is predicated upon a rule of law never before urged, to wit, that although the combined interests of all those affected made style piracy an evil; that although the program established reasonably necessary and equitably fair methods to curb the evil; that although the program had no other purpose except the elimination of such evil of style piracy (*William Filene's Sons* v. *FOGA,* 90 Fed. [2d] 556) all such justification is immaterial and the program is illegal solely because a monopoly, however limited, was created, even though such monopoly resulted in none of the evils which lead to the condemnation of monopolies.

While the Commission sought to establish that proof of boycott is proof of illegality per se, the Court below enunciated the doctrine that proof of monopoly is proof of illegality per se sufficient to sustain the Commission's order.

However, that "monopoly" has no fixed or artificial meaning, but that on the contrary that its meaning is obscure is urged in *C. E. Stevens & Foster* v. *Klieser Co.*, 109 Fed. (2d) 764, 770, and clearly whatever may be meant by monopoly, a monopoly is not unlawful when it does not affect price, deteriorate quality or limit production. *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Lynch* v. *Magnavox Co.*, 94 Fed. (2d) 883, 888; *Bigelow* v. *Calumet & Hecla Mining Co.*, 167 Fed. 704, 712, 716.

The failure on the part of the Commission to find that petitioners in any way affect price, deteriorate quality or limit production and the elimination by the Court below as irrelevant of the question of whether or not the petitioners substantially dominate the market adequately demonstrates that petitioners have not established a monopoly condemned by statute, since there can be no monopoly or threat thereof when opposing forces must compete for trade solely upon the merits of their product. *United States* v. *Patten*, 187 Fed. 664, at 672; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 545; *Standard Oil Co.* v. *Federal Trade Commission*, 282 Fed. 81, 86; *Federal Trade Commission* v. *Paramount Famous Lasky Corp.* 57 Fed. (2d) 152, 157.

V.

In seeking to sustain the respondent's order the Solicitor General abandons the theory advanced by the Court below (i. e., monopoly is proof of illegality per se) and reasserts the erroneous theory of the Commission that a boycott per se is illegal. That such is not the case has been long settled by this Court in the *Sugar Institute* and *Appalachian Coals* cases wherein the essential standard of reasonableness was erected in order that realities might dominate judgment in the determination of the existence of a restraint condemned by law.

Since obviously the Commission was seeking to establish an untenable legal theory this Court in reversing the order below should dismiss the complaint and not remand for further testimony.

VI

If style piracy is not a tort, can the program be sustained?

What is unfair competition condemnable by the Federal Trade Commission must be determined on the facts of the particular case upon specific evidence in the light of the particular competitive conditions and of the specific public interest in the particular industry. *Federal Trade Commission* v. *Curtis,* 260 U. S. 568; *Federal Trade Commission* v. *Beech Nut Packing Co.,* 257 U. S. 441; *Federal Trade Commission* v. *Klesner,* 280 U. S. 19; *Federal Trade Commission* v. *Algoma Lumber Co.,* 291 U. S. 67.

The petitioner herein made an offer of proof (fols. 12927-12980) to demonstrate and establish the atrocious conditions in the industry resulting from the prevalence of the evil of style piracy which necessitated collective action by petitioners because of the absence of a legal remedy against style piracy (*Cheney* v. *Doris Silk Corp.,* 35 Fed. [2d] 279), which testimony, in addition, would have established that style piracy was a socially undesirable form of competition. Appropriate extracts from such offer of proof are as follows:

(Fol. 12945)

> "I would prove that prior to the advent of the Guild this style piracy was responsible for the chaotic condition of the dress industry, for the inability of those creating styles to stay in business profitably, for the large number of bankruptcies which attended the industry."

(Fol. 12953)

"I would also prove that prior to the advent of the Guild this copying was a severe danger and injury to the retailer; that such design piracy also injured and in many cases destroyed the reputation of a retailer for honesty, stylability and service; that these are important assets of the retailer."

(Fol. 12957)

"I would also prove that before the advent of the Guild this style piracy was injurious and harmful to the consumer."

(Fol. 12960)

"I would also prove that the effect of this style piracy was tremendously injurious and detrimental to labor, for style piracy was the greatest of all contributing factors to the sweat shop conditions which were so long incident to the dress business."

(Fol. 12974)

"The members of the Guild realized that style piracy was destroying their business and industry and that cooperative effort was necessary in order to protect themselves and by reason thereof voluntarily and willingly instituted the Guild program as protection against the thieving practices of unscrupulous competitors who were perpetuating a method of doing business which was slowly destroying the entire industry."

(Fol. 12975)

"The Guild program has lately ameliorated evil conditions which existed due to the evil of style piracy and has been the greatest single factor in stabilizing the industry to the benefit of manufacturer, retailer, consumer and employer. The Guild program has resulted in increased competition on an ethical, fair, competitive basis and has resulted in a decrease of failures and of losses in the industry."

All testimony with regard to the elements of originality in a dress, the method of copying and the difference between a copy and an original dress was excluded by the Commission (fols. 1237, 1833-1840, 2567, 2700, 6677, 6788, 7745, 11013, 11924).

Proof of all of the foregoing would have established the existence of an industry-destroying evil, of an honest and fair program for its amelioration which did not affect a fixation of prices, a deterioration of quality or limitation of production (*William Filene's Sons* v. *FOGA*, 90 Fed. [2d] 556), regardless of the existence or non-existence of any property right in their merchandise. *Cheney* v. *Doris Silk Corp.*, 35 Fed. (2d) 279. Petitioners do possess the intangible right to protect their industry from destruction and to prevent the appropriation of their businesses. *International News Service* v. *Associated Press*, 248 U. S. 215.

Neither the *Cheney* case nor the *International News* case are strictly in point for in such cases resort was had to the Court for the sanction of a legal injunction. (Additionally the delays incident to obtaining injunctive relief and the expense of posting bonds preclude the use of such remedy if the *Cheney* case is wrong; and if the *Cheney* case is wrong then petitioners are possessed of a positive right which they may protect.) Petitioners seek to fill in the "hiatus of incompleted justice" resulting from their lack of a legal remedy solely in order to eliminate a socially undesirable form of competition which, if not tortious, is nevertheless unethically destructive. In such case absence of a legal remedy is a spur to judicial sanction rather than a bar. *Sugar Institute, Appalachian Coals* cases.

Since the respondent deliberately elected to exclude evidence of the existence of an evil necessitating the action complained of, proof of the existence of which was offered and could clearly have been established (*William Filene's Sons* v. *FOGA*, 90 Fed. [2d] 556), the order below should be reversed and the complaint of the respondent dismissed.

VII

Is there any evidence of price fixing or price protection? Did the offer of proof inferentially negative price fixing?

The Federal Trade Commission neither by word nor implication charged or argued that petitioner's program in any manner, either directly or indirectly, acted upon or affected price, price structures or price maintenance, or that the program was adopted to further or advance any of such purposes. No findings were made by the respondent with regard thereto or that the petitioner's program had any effect upon production or quality. The failure to so find is an equivalent to a finding in favor of petitioners. *Heuser* v. *Federal Trade Commission,* 4 Fed. (2d) 632 at 634; *Philip Carey Mfg. Co.* v. *Federal Trade Commission,* 29 Fed. (2d) 49; *Bene & Sons* v. *Federal Trade Commission,* 299 Fed. 468 at 471.

On the contrary, the respondent affirmatively found that all members of the petitioner are in active competition among themselves (fol. 363).

The Court below, in its opinion, has held that the question of price fixing is not involved in the instant case.

All of the foregoing is predicated upon the uncontradicted and unchallenged testimony of petitioners, the only testimony in the record upon the subject, as follows (fol. 13,101):

> "Q. Now, Mr. Post, has the Guild at any time in the execution of its program attempted to in any manner fix prices at which either the manufacturer may sell dresses to the retailer or the retailer to the consumer? A. It has not in any way.
>
> Q. Has the Fashion Originators Guild at any time required or advised or interested itself in the price at which any manufacturer was to sell his dresses? A. It has not, directly or indirectly, or in any manner.

Q. And is it a fact that in so far as the Fashion Originators Guild is concerned any manufacturer may sell his dresses at any price, in any price line or in any manner in so far as the price is concerned which he deems fit? A. We have no interest in prices and he may do as he pleases.

Q. Has the Fashion Originators Guild of America at any time during its existence in any manner attempted to control or regulate the production on the part of its members? A. It has nothing whatever to do with production.

Q. Has the Fashion Originators Guild of America at any time since its inception attempted in any manner to allocate or parcel out customers to its members? A. It has not.

Q. Or to in any manner assign territory to its members? A. No, they have not.

Q. Has the Fashion Originators Guild of America at all times attempted to encourage and permit free and active competition among its members or the retail trade? A. They have.

Q. Has the Fashion Originators Guild of America at any time attempted to in any manner interfere, advise or direct manufacturers with respect to the quality of the material which they use? A. No, they have not."

Without the slightest support in the record or the findings of the respondent, the Solicitor General has urged that petitioner's program maintains a floor to prices. The uncontested record indicates that the members of the Fashion Originators Guild constituted manufacturers in a price range fron. 3.95 to, for practical purposes, infinity, and the respondent has found that all members compete freely with each other (fol. 363). Under such circumstances that the inference of the Solicitor General is utterly unfounded is immediately apparent.

Petitioners' members do not protest against honest competition which may necessitate their production of quality dresses in a lower price line than customary. Petitioners' program is aimed at the evil of copying which results in the manufacture of a cheap copy of an expensive original

which makes the expensive original unsaleable but does not gain a customer for the cheap copy. The woman who would buy the expensive original dress will merely refrain from buying that model which she has seen copied and will not buy the cheap copy either. Thus, the copyist battens on the creative genius, financial investment and business industry of the manufacturer of originals to the utter confusion of the entire industry, of labor, and of the consumer, as previously noted.

In the light of the record, it is patent that price fixing, price protection, price maintenance or any improper influence on prices is not an element in the instant case.

VIII

What is the relationship between patent pools and the present program?

None.

The object of a patent pool is to preserve a monopoly for a limited fraternity with the intent and accomplishment of a fixation of prices. The purpose and motive of such combinations are sufficient to condemn them. As has heretofore been shown, petitioner's program may be joined by any manufacturer who will be entitled to all of its benefits. The program in no way affects prices, limits production, ...iorates quality or assigns markets. The members of the Fashion Originators Guild of America are in active competition with each other. Their combination arises not from a desire to boycott in order to harm competitors in order to accomplish any of such ends, but is aimed solely and only at the amelioration of the industry-destroying evil of style piracy which adversely affected manufacturers, retailers, laborer and consumer. Their combination was defensive to preserve the industry for the good of all and not offensive to obtain advantage for a few.

The beneficent effect of the program has never been challenged by any Court and, while banning it on technical grounds, even the Court below did not question its purposes, motives or accomplishments.

The realities which must dominate judgment referred to in the *Appalachian Coals* case, 288 U. S. 344, at 360, clearly demonstrate that the reasons which impel the condemnation of patent pools do not apply to petitioners' program. On the contrary the doctrine of the *Sugar Institute* case that co-operative endeavor to eliminate industry abuses is proper supports petitioners' program herein.

IX

The Millinery Guild case distinguished.

Upon oral argument the Solicitor-General strained to identify the program of the Fashion Originators Guild of America, petitioners herein, with that of the Millinery Guild.

There is no common ground of attack.

(1) Contrary to the findings of the Commission and the decision of the Court in the *Millinery Guild* case, there is no question but that this petitioner's program does not intend to and does not in any way affect or regulate prices. This is evident from the lack of finding thereon by the respondent and from the affirmative testimony with regard thereto which is unchallenged and uncontradicted (fols. 13,101, 13,102).

(2) Under the rules established by petitioners, anyone may become a member of the Fashion Originators Guild of America without restriction if the applicant subscribes to the policy of the elimination of style piracy. In the *Millinery Guild* case, membership therein is restricted.

(3) Petitioners' program provides for the registration of designs but specifically proclaims that such registration establishes no presumption of originality but only the date when such contention has first been made. Registration with the Millinery Guild establishes a presumption of originality.

(4) The Boards of Arbitration established by petitioners are absolutely impartial, unconnected with the members of the Fashion Originators Guild of America and determine the question of whether or not a design is an original or a copy. (The impartiality of such boards is not questioned.) In the *Millinery Guild* case the members thereof determine such question.

(5) Petitioners herein established a panel of arbitrators in order to provide for unbiased determination of the question and if he so desired a protesting copyist manufacturer was permitted to establish a Board of Arbitration of one member of his choice, one member chosen by the Guild, the two to choose a third. The Millinery Guild provided no alternatives.

(6) Petitioners' program under no circumstances permits even the registration of an import or an adaptation of an import as a member's original. In the Millinery Guild, members were permitted to register a Parisian import as a member's original.

(7) Petitioners established an elaborate method of appeal whereby an aggrieved copyist manufacturer might appeal his claim to another Board of Arbitration. The Millinery Guild provides no such procedure.

(8) Unlike the Millinery Guild member (who is expelled for violation of rules), members of the Fashion Guild who violate its rules are not expelled or thereafter excluded from membership but are fined in an amount commensurate

with the violation. No claim has ever been made that such fine was arbitrary or excessive.

(9) It should be borne in mind that co-operating retailers are not required to desist from doing business with copyist manufacturers. Co-operating retailers only agree not to sell a dress which has been adjudged a copy. Although the retailer may have taken off sale a dress which has been adjudged a copy, nothing prevents the retailer from continuing to do business with such manufacturer as to any and all dresses which may not have been adjudged copies. Retailers who co-operate with the Millinery Guild were required to desist from doing any business with copyist manufacturers.

(10) Every Court before whom petitioners' program has been presented has upheld petitioners' program in its mechanics as fairly, reasonably, honestly and justly administered and the record fails to reveal any claim on the part of the respondent or of any copyist manufacturer that his dress was improperly, arbitrarily or unfairly adjudged a copy. The mechanics of the Millinery Guild program have been attacked as arbitrary and unfair and in effect the Millinery Guild has subscribed to such attack by volunteering to change the mechanics of its program to conform to that of petitioners.

CONCLUSION

The respondent tried this case and urges its affirmance upon a simple legal theory, to-wit: that a boycott is illegal per se and that no evidence of any kind may be introduced in justification thereof. It is clear that the respondent deliberately chose to exclude evidence uniformly held material in order to establish this legal proposition. That the object of the respondent was to establish new law rather than to attack petitioners' program, as such, is a reason-

able conclusion not alone from the record but from the arguments presented in attempting to sustain the order. Petitioners have been required to expend thousands upon thousands of dollars to defend themselves from the imposition of this improper legal theory. The respondent has failed to prove its case as it attempted to prove it.

Under the circumstances, it is respectfully submitted that the order of the Circuit Court of Appeals, Second Circuit, affirming the cease and desist order of the Federal Trade Commission should be reversed, the cease and desist order entered by the Federal Trade Commission and the complaint dismissed.

Respectfully submitted,

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